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No. 05-875

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN ALLEN DRAUGHON
Respondent,

v.

DOUG DRETKE, Director, Texas Department of
Criminal Justice, Correctional Institutional Division
Petitioner.

On Petition For Writ of Certiorari
to the Fifth Circuit Court of Appeals

REPLY BRIEF

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REPLY

Draughon maintains that certiorari review is not warranted in this case because “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated law.” Opposition at 1 (*citing* SUP. CT. R. 10). He further maintains that the Director’s argument for certiorari is little more than a plea for this Court to engage in further appellate review. However, contrary to Draughon’s assertions, this case merits review.

While it is true that this Court does not often grant a writ of certiorari to review erroneous factual findings or misapplication of a properly stated law, the fact remains that this Court can and *does* grant review under these circumstances. In particular, this Court has granted certiorari review in several instances where the law being misapplied is the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for ineffective assistance of counsel. Furthermore, these certiorari grants most often occur in federal habeas cases, such as this, where the application of the AEDPA’s¹ deferential standard was also in issue.

In *Bradshaw v. Richey*, 126 S. Ct. 602 (2005), *Holland v. Jackson*, 542 U.S. 649 (2004), and *Woodford v. Visciotti*, 537 U.S. 19 (2002), this Court granted certiorari to review the court of appeals’ erroneous grants of federal habeas relief on *Strickland* grounds. In each of these cases, the Court reversed the lower court’s holding finding that *Strickland* and/or the AEDPA had been misapplied to the fact of the case. *Richey*, 126 S. Ct. at 605-06 (holding that the Sixth Circuit improperly adjudicated the *Strickland* claim by relying upon evidence that was not properly

¹ Antiterrorism and Effective Death Penalty Act (1996).

presented to the state habeas court); *Jackson*, 542 U.S. at 652-55 (concluding that the Sixth Circuit erred finding the state court's application of *Strickland* unreasonable based upon evidence not properly before the state court and misapplication of the prejudice standard); *Visciotti*, 537 U.S. at 23-24, 26-27 (finding that the Ninth Circuit granted federal habeas relief in error because the state court's adjudication of the ineffective assistance of counsel claim was neither contrary to, nor an unreasonable application of, *Strickland*).

In *Rompilla v. Beard*, 125 S. Ct. 2456 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court granted certiorari to review the lower courts' applications of *Strickland* as it applied to counsel's duty to provide reasonable investigation of trial matters. It is clear that in granting review in these cases the Court intended to provide a clearer and more complete understanding of counsel's Sixth Amendment obligations regarding the adequacy of investigations.

In the same way, the Court should grant certiorari in this case to clarify and provide a more comprehensive understanding of *Strickland* as it applies to hindsight analysis. Although there is no disagreement among courts that appellate review of counsel's representation must be highly deferential "with every effort made to avoid the distorting effect of hindsight," see *Strickland*, 466 U.S. at 698-90, the fact remains that there is little precedent specifically addressing this issue. Because the court of appeals' analysis in this case was distorted by hindsight, this case provides a unique opportunity for this Court to reinforce and provide further direction on this principle.

CONCLUSION

For the reasons stated above, the Director respectfully

requests that this Court grant certiorari review to ensure uniform application *Strickland*.

Respectfully submitted,

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